Moomin bin Seman v Public Prosecutor

HIGH COURT (MUAR) — CRIMINAL APPEAL NO 42-12-1990
RICHARD TALALLA J
1 JUNE 1993

Evidence *— Refreshing of memory — In what circumstances witness may refresh memory — Whether witness may do so as of right — Purpose of statutory safeguards*

Evidence *— Refreshing of memory — Witness refreshing memory out of court — Previous statement to police — Whether adverse party had right to be shown statement and to cross-examine thereof — Whether witness remains under examination if case is stood down or adjourned — Evidence Act 1950 ss 159, 160 & 161*

Criminal Procedure *— Contempt of court — Prosecution refreshing memory of witness during adjournment — Whether that could amount to contempt punishable under the Penal Code (FMS Cap 45) — Penal Code (FMS Cap 45)*

The appellant was charged for corruption. During the course of the trial, the complainant gave evidence as to what happened, after which the prosecuting officer applied for an adjournment on the ground that the complainant was not well. The court adjourned the case to the following day and this time, the complainant gave a totally different version of what happened in his testimony. During cross-examination, the complainant explained that his memory had been refreshed and that the day before, he was brought to the Anti Corruption Agency's office where he asked for his statement to be read back to him. When defence counsel applied for the production of the statement, the prosecuting officer objected and the objection was upheld. The appellant was called upon to enter his defence and after doing so, the court convicted him. The main ground of appeal was that the court erred in refusing the appellant sight of the statement used by the complainant to refresh his memory which amounted to a denial of the appellant's right under s 161 of the Evidence Act 1950 ('the Act').

Held, allowing the appeal:

(1) A witness testifying in court should speak from memory unaided and only when that cannot be done, can recourse be had to his written statement. If this is not followed, the statement may be relied upon in place of that expressed from memory alone and the two may not be the same at the time of testifying. A witness cannot refresh his memory as of right. It is within the discretion of the court whether or not to allow it.

(2) The statutory safeguards of s 159 of the Act exist to ensure that the writing is a true record of the perception of the witness and not a distortion of the truth contrived by the questioner or others having an interest in the witness telling lies. The right of the adverse party to be shown the statement and to cross-examine the witness on it will ensure that the statutory safeguards are met.

(3) There is a clear demarcation between investigation into or presentation of a case and testing a witness for the truth. The latter falls within the province of the judge and any trespass invites suspicion and accusation of coaching or abetting the offence of giving false evidence. A witness remains under examination notwithstanding the fact that the case is stood down or adjourned. If his memory is refreshed during that interval, those guilty of doing so may be in contempt and guilty of interfering with the course of justice under the Penal Code (FMS Cap 45).

(4) Based on the facts adumbrated, the course taken by the prosecution was wholly improper since it had undermined the provisions of ss 159 and 161 of the Act. The court was not shown the statement and could not ascertain whether s 159 of the Act had been adhered to.

[Bahasa Malaysia summary

Perayu telah didakwa kerana kesalahan rasuah. Pada perbicaraan itu, pengadu telah memberi keterangan mengenai apa yang telah berlaku dan selepas itu pegawai pendakwa telah memohon penangguhan atas alasan bahawa pengadu kurang sihat. Mahkamah telah menangguhkan kes ke hari yang berikutnya dan pada kali ini, pengadu telah memberi versi yang berbeza sama sekali di dalam testimoninya mengenai apa yang telah berlaku. Semasa pemeriksaan balas, pengadu telah menjelaskan bahawa beliau telah diperingatkan semula tentang apa yang telah berlaku, dan pada hari sebelumnya, selepas kes ditangguh, beliau telah dibawa ke pejabat Badan Pencegah Rasuah di mana beliau meminta supaya pernyataannya dibacakan semula kepadanya. Apabila peguambela memohon untuk mendapat sesalinan pernyataan tersebut, pegawai pendakwa telah membantah dan mahkamah membenarkan bantahan itu. Perayu telah dipanggil supaya membela diri dan setelah mendengar keterangannya, beliau telah disabitkan. Alasan utama dalam rayuan ini adalah bahawa mahkamah telah tersilap apabila tidak membenarkan perayu melihat pernyataan yang digunakan oleh pengadu untuk diperingatkan semula dan bahawa ini telah terjumlah kepada penafian hak perayu di bawah s 161 Akta Keterangan 1950 ('Akta itu').

Diputuskan, membenarkan rayuan:

(1) Seorang saksi yang memberi keterangan di mahkamah haruslah bercakap daripada ingatan tanpa bantuan dan hanya apabila ini tidak dapat dilakukan, bolehlah beliau merujuk kepada pernyataan bertulisnya. Jika prosedur ini tidak diikuti, pernyataan tersebut mungkin menggantikan keterangan lisan yang dizahirkan daripada ingatan sahaja dan kedua-duanya mungkin tidak serupa semasa keterangan diberi. Seseorang saksi tidak mempunyai hak mutlak untuk diperingatkan semula. Adalah budibicara mahkamah sama ada untuk membenarkannya ataupun tidak.

(2) Perlindungan statutori s 159 Akta itu wujud untuk memastikan bahawa pernyataan bertulis itu adalah rakaman benar tanggapan saksi, dan bukan pemutar-belitan kebenaran yang direka oleh penyoal atau orang lain yang mempunyai kepentingan dalam saksi supaya bercakap bohong. Hak pihak lawan untuk ditunjukkan pernyataan dan memeriksa balas saksi mengenainya akan menjamin bahawa perlindungan statutori dipenuhi.

(3) Terdapat perbatasan yang nyata di antara siasatan ke dalam atau penyampaian sesuatu kes dan pengujian saksi untuk kebenaran. Pengujian saksi adalah dalam kuasa hakim semata-mata dan sebarang pencerobohan ke atas kuasa ini akan menimbulkan syak wasangka dan tuduhan mengajar saksi atau bersubahat dalam kesalahan memberi keterangan palsu. Seseorang saksi tetap kekal dalam pemeriksaan walaupun kes ditangguhkan sebentar atau ditangguhkan ke tarikh lain. Jika diperingatkan semula dalam tempoh tersebut, sesiapa yang berbuat demikian mungkin boleh didapati menghina mahkamah dan didapati bersalah kerana mengganggu perjalanan proses keadilan di bawah Kanun Keseksaan (FMS Bab 45).

(4) Berdasarkan kepada fakta-fakta kes ini, perbuatan pihak pendakwa tidak patut sama sekali kerana telah melemahkan peruntukan s 159 dan 161 Akta itu. Mahkamah tidak ditunjukkan pernyataan tersebut dan tidak dapat menentukan sama ada s 159 telah dipatuhi.]

Notes

For cases on the refreshing of memory, see 7 *Mallal's Digest* (4th Ed) paras 1177–1182.

For cases on contempt of court, see 5 *Mallal's Digest* (4th Ed) paras 930–954.

Cases referred to

1 *Sebastian v PP* [1970] 2 MLJ 76 (refd)
2 *Lau Pak Ngam v R* [1966] Crim LR 443; [1966] HKLR 246 (folld)
3 *R v Yellow and Thay* (unreported) (refd)
4 *Kanbi Vaghji Savji v State of Gujarat* [1968] Crim LJ 54 (refd)
5 *R v Richardson* [1971] 2 All ER 773; [1971] 2 QB 484 (folld)
6 *Lim Hong Yap v PP* [1978] 1 MLJ 154 (folld)

Legislation referred to

Evidence Act 1950 ss 159, 160, 161

Mohd Latip Sarrugi (*Mohd Latip & Associates*) for the appellant.
Ahmad Bache (Deputy Public Prosecutor) for the respondent.

Richard Talalla J: The appellant, a police constable, was brought before the Sessions Court, Batu Pahat and charged with having, on 24 June 1987 at the Vienna Hotel, Batu Pahat ('the hotel'), corruptly accepted RM300

A from one Tan Tiu Kwee (Tan) as an inducement not to take action against a certain person in respect of an offence. The appellant having claimed to be tried, the court proceeded to take all evidence produced in support of the prosecution including that of Tan who testified that he gave the money in question to the appellant in the coffee house of the hotel and that the appellant having taken the money, indicated that he wished to leave and then departed from the coffee house. Tan added that the appellant offered him a lift in his car to the city but he, Tan, declined as he had no need for transport whereupon the appellant left by himself. Then followed a clumsy and disjointed course of events. The prosecuting officer applied for an adjournment for Tan to refresh his memory. Counsel for the appellant objected saying that the witness had been giving truthful evidence. The court simply made an observation that since Tan did not show any reaction, he appeared to be fit to give evidence. Of course all this transpired in the presence of Tan who then went on to testify that he did not remember how many days he was held in the lockup. He complained that he was unable to sleep and added that the statement which he gave to the Anti Corruption Agency ('the ACA') in respect of this trial was not read back to him. He testified further that his evidence was based on his memory. The prosecuting officer then again applied for an adjournment, this time because the witness was not well. The record indicates that defence counsel had no objection but counsel for the appellant who also represented him at the trial told me that he did object to the adjournment. To my mind, it is irrelevant whether or not there was objection. The trial was adjourned to the following day. When the trial resumed, Tan had a different tale to tell. This time his testimony was that at the coffee house, he only tendered the RM300 but the appellant told him not to do so because he was afraid that people would see. Leaving the coffee house, the appellant directed Tan to get into the appellant's car which he (Tan) did and wherein he sat next to the appellant. The appellant then invited Tan to go somewhere else. Tan did not agree. The appellant said that since Tan did not want to follow him, Tan could tender the money in the car. Tan then took RM300 from his shirt pocket and handed it to the appellant. The appellant took the money and counted it. Tan then got down from the car. This then was Tan's testimony given on the second day of the trial. By way of apparent explanation for the change of story, Tan testified that he was then still in police custody, tired and sleepy.

In cross-examination, Tan testified that his memory had been refreshed, that the day before he had gone to the ACA office at 2.30pm, where he met the ACA officer who had received his report and he (Tan) had asked that his statement be read back to him and that the officer did so. Tan referred to the event as a discussion, and testified that the discussion took 20 minutes. He testified further that the statement in question was his because it bore his name and the date he made the report. Counsel for the defence then applied for the production of the statement. The prosecuting officer objected. Defence counsel then invoked the provisions of ss 159 and 161 of the Evidence Act 1950 ('the Act') which said sections, together with s 160 of the Act, read as follows:

159 Refreshing memory

(1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.

(2) The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.

(3) Whenever the witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of that document:

Provided the court is satisfied that there is sufficient reason for the non-production of the original.

(4) An expert may refresh his memory by reference to professional treatises.

160 Testimony to facts stated in document mentioned in s 159

A witness may also testify to facts mentioned in any such document as is mentioned in section 159 although he has no specific recollection of the facts themselves, if he is sure that the facts were correctly recorded in the document.

161 Right of adverse party as to writing used to refresh memory

Any writing referred to under section 159 or 160 must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

Despite the sections, the court refused counsel's application, holding that the defence was not entitled to be served with the statement because, so the court held, the statement was not referred to the witness in court. The trial then proceeded. The appellant was called on to enter upon his defence. The appellant did so. The defence was rejected and the appellant was convicted. The appellant being dissatisfied with the conviction has appealed to this court against the conviction.

The main ground of appeal is that the court erred in refusing the appellant sight of the statement used by Tan to refresh his memory, the refusal amounting to a denial of the appellant's right under s 161. The appeal brings into question the law relating to the refreshing of memory and in particular the reason for and the application of that law.

As I see it, the law exists as an aid to the court in ascertaining the truth — making right findings of fact. Facts are generally determined by hearing and observing witnesses testifying to things they claim to have perceived, usually through the five normal senses. To enable this to be done, they depend on their memory. Memory is the mental power to keep something perceived in the mind or to recall such a thing to mind. That power varies from person to person and with the circumstance. It tends to fade with lapse of time, the old and infirm, injury and disease. The list and permutations are interminable. Perceptions of routine events are not generally remembered. That is why doctors maintain records of patients and policeman keep diaries. Reduced to writing, they are aids to memory. Diplomats do it too but they more stylishly call their handiwork an 'aide memoire'. Accordingly,

A it accords with good sense that as soon as reasonable possible after an event, a witness who is likely to be required to testify thereto later, should have the perception of it reduced to a written statement ('the writing') in support of memory, lest the witness forgets. The writing should indeed be a true record of the perceptions of the witness, duly expressed by the witness, uninfluenced by anyone else. Plainly speaking, witnesses should not be B coached, whether before or after the perception is transcribed, or at all.

A witness testifying in court should initially speak from memory, unaided, and it is only when the witness finds that that cannot be done, recourse is sought to the writing. Otherwise the writing may be relied on in place of that expressed from memory and the two may not at the time of testifying C be the same. See the observation of Winslow J in *Sebastian v PP.*[1] Indeed, such a course has been recognized by the legislature as manifested by ss 159–161 of the Act.

The statutory provisions for refreshing memory are by reference to s 159, conditioned. The first condition is that the writing by which the memory of a witness is to be refreshed must have been made by the witness himself or D if by any other person then the writing must have been read by the witness and at the time of such reading known by the witness to be correct. A second condition is that the writing when made, or read and known as the case may be had to be so done at the time of the transaction concerning which the witness is questioned, or so soon afterwards that the court E considers it likely that the transaction was at that time fresh in his memory notwithstanding that the first condition may have been met. A witness cannot so refresh his memory by right. It is within the discretion of the court whether or not to allow it. The discretion of course will be exercised upon a consideration of all the facts and circumstances at a particular time pertaining.

F It will be seen by reference to s 159(1) and (2) of the Act that the writing is of a transaction concerning which the witness is questioned. As I see it, the statutory safeguards exist to ensure that the writing is a true record of the perception of the witness of a thing the witness is to testify to and not a distortion of the truth contrived by the questioner or others having an G interest in the witness not telling the truth.

As I see it, the statutory right of the adverse party to be shown the writing and to cross-examine the witness on it is of great value to that party for it is upon a knowledge of that writing and testing the witness thereon that the adverse party will be able the better if not the best to ensure that the statutory safeguards have been met.

H In *Lau Pak Ngam v R*,[2] the appellant was convicted, inter alia, of attempted rape. One ground of appeal was that the trial judge failed to consider a question of coaching or interference with the prosecution witness by the police, for on the eve of the trial, the investigating officer had read over to the principal prosecution witnesses, in their joint presence, the I statements which had been taken from them shortly after the incident in question. Also, upon the conclusion of the first day's hearing, when the principal prosecution witness, the victim, a 15-year-old girl, was still under cross-examination, she was taken in a police vehicle to the police station

and was present for a considerable time in the office of the officer in charge of the investigation whilst, in pursuance of a request made to him by prosecuting counsel, he made further enquiries from her parents as to a matter which had arisen during the course of the case. Hogan CJ delivering the judgment of the full court and dismissing the appeal upon overall consideration made a number of observations, four of which, at pp 252, 253, 254 and 249, are respectfully agreed with and set out as follows:

(1) The ideal might well be that witnesses should be able, without aid of reference to statements or notes made at a time closer to the events in question, to recall with clarity and accuracy the details of earlier events but witnesses are human beings and, as such, apt to forget the details of events as time goes by. If a witness is denied reasonable opportunities of refreshing his memory in the way ordinary men of affairs refresh theirs, a danger must arise that the courts will be unnecessarily deprived of the full testimony and information which they should have in order to do justice. There is, we think, a greater danger of this than of encouraging or facilitating untruthful testimony by permitting access to earlier statements.

(2) One must, of course, recognize that a witness may not wish to refresh his memory and if, in such circumstances, any pressure is used to make him do so, allegations of coaching may be difficult to refute. Moreover, we think it is undesirable that statements of witnesses should be read over to them in each other's company when each is able to hear what the other has said and we would deprecate such a practice.

(3) If a police officer — or indeed anyone connected with a case — enters unnecessarily into conversation with a witness as to his or her evidence during an adjournment of the witness's testimony, the officer at once exposes himself and the witness to the suggestion that the evidence subsequently given is in some way affected by such conversation and possibly distorted so as to present a picture more favourable to one side.

(4) Anything in the nature of coaching a witness in the evidence he is expected to give would be most reprehensible and would call for condemnation.

As I see it, the first observation must be accepted as representing the law of this country as deducible from the provisions of s 159(1) which I construe as requiring a witness under the supervision of the judge making reasonable attempt to testify from memory and only upon the judge being satisfied, after a consideration of all relevant facts and circumstances pertaining, that the witness cannot so testify and should in justice be permitted to refresh memory may the witness by leave of the judge refer to a writing which meets the conditions set out in the section.

The learned Chief Justice at p 251 made a further observation, namely, that there is no accepted rule that it is preferable for witnesses to refresh their memories by reference to documents in court rather than by looking at such documents before going into the witness box. With respect I do not see that observation as representing the law of this country. The observation

in its application to s 159(1) constitutes an invitation to all and sundry, including those motivated to pervert the course of justice by the giving of false evidence which is punishable under the Penal Code (FMS Cap 45), to usurp the function, indeed the duty of the judge, prescribed by s 159(1). In a criminal case, the function of the police is as set out in Ch XIII of the Criminal Procedure Code (FMS Cap 9) ('the Code') to investigate the case and that of the public prosecutor to present the evidence fairly before the court for the judge's consideration. I see a clear line of demarcation between investigation and presentation on the one hand and testing a witness, including memory, for the truth on the other. The latter falls within the exclusive province of the judge in which neither the police nor the prosecutor should be concerned, Trespassing into that province invites suspicion and consequent accusation of coaching and worse still abetting the offence of giving false evidence.

In *Lau*'s case[2] the learned Chief Justice referred to *R v Yellow and Thay*,[3] referred to in 1932 JP 826 where Humphreys J said at p 250 that providing prosecution witnesses with copies of their statements, whether asked for or not, was undesirable and it could lead to unfortunate results in some cases, when witnesses would be giving evidence not of their recollection 'of the circumstances' but of what they had been learning 'more or less by heart' which the learned Chief Justice described at p 252 as being logically indefensible as a general proposition. The proposition speaks to a mischief recognized by our legislature in enacting s 159(1) which effectively provides for the judge to guard against the mischief. In *Kanbi Vaghji Savji v State of Gujarat*,[4] a case where the police statement of a witness was read over to him before he gave evidence in court, Shelat J observed that the witness was likely to depose to the incident on the basis of what he had just heard read from his statement and not so much on the basis of his recollection of what he had said about the incident before the police. This last case was referred to, as was *Lau*'s case[2] in *Sebastian v PP*[1] abovestated, where Winslow J added a further danger, namely, that a witness refreshing memory from a previous statement might feel obliged to adhere to it even if the witness no longer believed it to be true. To my mind problems of the kind envisaged by the three named judges last referred to when thought likely to arise are best left to the trial judge to resolve within the ambit of s 159(1).

In *R v Richardson*,[5] the appellant had been convicted of burglary. The certificate of the trial judge that the case was one fit for appeal, see pp 775 and 776, reads as follows:

> Each of the five civilian witnesses called for the prosecution refreshed their memories by reading the statements which they had respectively made to the police in July 1969. They did this shortly before being called to give evidence at the trial. This fact came to light during the course of the trial and objection to what had occurred was taken immediately by the defence. In the course of argument I was referred to Home Office Circular No 82/1969 ('Supplies of copies of witnesses' statements') dated 9 April 1969. This circular expresses the view that 'notwithstanding that criminal proceedings may be pending or contemplated, the chief officer of police should normally provide a person, *on request*, with a copy of his statement to the police'. In the present case, however, it appeared that the prosecution had taken the initiative in telling each of the

witnesses concerned that they might refresh their memories, if they wished, by reading their respective statements. Each of the witnesses did this.

I ruled that in view of all the circumstances this was not objectionable and that the defence had not been prejudiced by what had occurred. In reaching this view, I took into consideration (i) the exceptional length of time which had elapsed before the case came on for trial; (ii) that evidence of positive identification at two identification parades was to be called by the prosecution; (iii) that the jury were told that the witnesses had seen their statements to the police before giving evidence, and the jury could therefore evaluate the evidence of the witnesses in the light of this information; (iv) that at the same time the jury were told that they should not convict unless they were sure that the identifications on the identification parades were correct; this was repeated in the summing-up with a warning as to the danger of identification by a single witness and they were enjoined to consider each count separately; and (v) that if in comparable circumstances witnesses for the defence were shown their proofs of evidence no objection could be taken. A fortiori witnesses, who signed statements which incorporated a warning of the penalties involved if they did not tell the truth in their statement, could see that statement. (Emphasis supplied.)

Sachs LJ delivering the judgment of the Court of Appeal, comprising himself, Fenton Atkinson LJ and Mars-Jones J, dismissing the appeal against Richardson's conviction upon a consideration of all the facts, found it necessary to consider what should be the general approach of the court to witnesses being shown, in the way they were, their statements which were not 'contemporaneous' within the meaning of that word as normally applied to documents used to refresh memory. The learned judge at pp 776 and 777 observed as follows:

First, it is to be observed that it is the practice of the courts not to allow a witness to refresh his memory in the witness box by reference to written statements unless made contemporaneously. Secondly, it has been recognized in a circular issued in April 1969 with the approval of Lord Parker CJ and the judges of the Queen's Bench Division (the repositories of the common law) that witnesses for the prosecution in criminal cases are normally (though not in all circumstances) entitled, if they so request, to copies of any statements taken from them by police officers. Thirdly, it is to be noted that witnesses for the defence are normally as is known to be the practice, allowed to have copies of their statements and refresh their memories from them at any time up to the moment they go into the witness box — indeed counsel for the appellant was careful not to submit that there was anything wrong about that. Fourthly, no one has ever suggested that in civil proceedings witnesses may not see their statements up to the time they go into the witness box. One has only to think for a moment of witnesses going into the witness box. One has only to think for a moment of witnesses going into the box to deal with accidents which took place five or six years previously to conclude that it would be highly unreasonable if they were not allowed to see them. Is there then anything wrong in the witnesses in this case being offered an opportunity to see that which they were entitled to ask for and to be shown on request? In a case such as the present is justice more likely to be done if a witness may not see a statement made by him at a time very much closer to that of the incident?

Curiously enough, these questions are very bare of authority. Indeed the only case which has a direct bearing on this issue is one which was decided not in this country but on appeal in the Supreme Court of Hong Kong in 1966: *Lau*

Pak Ngam v R, which is compactly reported. In the view of each member of this court it contains some sage observations, two of which are apt to be quoted. One of them is:

> 'Testimony in the witness box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question.'

The other:

> 'Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses.'

With those views this court agrees. It is true that by the practice of the courts of this country a line is drawn at the moment when a witness enters the witness box and when giving evidence there in chief he cannot refresh his memory except by a document which, to quote the words of *Phipson on Evidence*, 'must have been written either at the time of the transaction or so shortly afterwards that the facts were fresh in his memory'. (Incidentally, that definition does provide a measure of elasticity and should not be taken to confine witnesses to an over-short period.) It is moreover a practice which the courts can enforce; when a witness is in the box the court can see that he complies with that practice. The courts, however, must take care not to deprive themselves by new, artificial rules of practice of the best chances of learning the truth. The courts are under no compulsion unnecessarily to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice. Obviously it would be wrong if several witnesses were handed statements in circumstances which enabled one to compare with another what each had said. But there can be no general rule (which incidentally would be unenforceable, unlike the rule as to what can be done in the witness box) that witnesses may not before trial see the statements they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed one can imagine many cases, particularly those of a complex nature, where such a rule would militate very greatly against the interests of justice.

Lim Hong Yap v PP[6] was a case where the appellant was convicted of trafficking in heroin. One of the grounds of appeal was that the trial judges failed to give full credence to three material prosecution witnesses who were given copies of their statements to the investigating officer and their evidence at the preliminary inquiry to refresh their memory before giving evidence at the trial and to recognize that the evidence of these prosecution witnesses was based on written statements made long after the event. In the Singapore Court of Criminal Appeal (Wee Chong Jin CJ, Chua and Rajah JJ) upon a consideration of the case as a whole dismissed the appeal. In doing so, the learned Chief Justice considered and applied the judgment abovestated in *Richardson*'s case.[5]

The dictum of Hogan CJ that testimony in the witness box becomes more a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question, now stamped with the approval of the Singapore Court of Criminal Appeal and the English Court of Appeal, is respectfully accepted but only to the extent

that it does not offend against the provisions, express or implied, of ss 159 and 160 of the Act by which I am bound. Thus, inasmuch as that dictum constitutes authority for refreshing memory other than while under examination before the trial judge, I decline to follow the dictum or any case supporting that dictum. It might be added that our judges are well equipped to meet the situation and all factual variations arising for by virtue of s 165 of the Act, the judge generally (I will make no reference to the proviso to that section) may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

A corner stone of our judicial system is that justice must not only be done but be seen to be done. It is better done and seen to be done in the public and impartial environs of a court room than within the secret and intimidating confines of a police station. Thus by reference to the facts in *Lau*'s case,[2] in the absence of sinister motive, I do not see that what was sought to be achieved by taking the girl down to the police station could not have been attained before the judge in open court and if it could not have been obtained in court, then there had to be a valid explanation publicly given for trying to get it done privately at the police station.

Turning to other observations in *Lau*'s case,[2] see p 253, I respectfully agree that organizing a reading to prosecution witnesses of their respective statements in their joint presence before trial is a practice to be thoroughly deprecated. It constitutes a compounding of the malpractice of individual access. Not only does this have the effect of negating ss 159 and 160, but it also violates the right of the adverse party conferred by s 161.

Reverting to the Hong Kong case, at p 253, instancing as an example a witness who declines to make a statement to the police unless given a copy of it, there is no such thing in this country. Witnesses must co-operate and give the police statements without the right of having a copy of it. See ss 111 and 112 of the Code. As I see it, upon a witness requesting such a copy or to refresh memory, the police or the prosecutor, as the case may be, should decline and instead draw the attention of the witness to the gist of ss 159 and 160.

Also at p 253 of *Lau*'s case,[2] it was observed that if there was to be such a rule, it must surely apply not merely to prosecution witnesses but to defence witnesses as well, that there was no justification for confining the rule as to refreshing memory to criminal cases only, that witnesses in civil cases would, presumably, have to be restricted in the same way, that so far as was known, no one had ever attempted to formulate such a general rule and that no justification could be seen for formulating one for prosecution witnesses only. Granted that the underlying object of ss 159–161 of the Act is the obtaining of truthful testimony and refreshing the memory of a witness outside examination before the trial judge would open a party to accusation of coaching, pointing to the weight and value of the testimony of

A the witness being reduced, the said sections apply to all witnesses regardless of whether they are for the prosecution or the defence in a criminal or civil case, a fortiori as the Act applies to evidence generally that is to say to all trials criminal and civil. However, but without in any way detracting from that proscription, it has to be recognized that in a criminal trial, the B prosecution and all persons concerned with it including witnesses have a public duty to ensure that the accused has a fair trial. Their interest should be public, not partisan, unlike the interest of witnesses for the defence in such a trial or in civil cases whose interest is generally personal. A disinterested witness is more prone to forget than a witness personally concerned. Hence the need to refresh memory is more applicable to the former category than C the latter. With its public duty in mind and also the onus of having to prove its case beyond reasonable doubt, it behoves the prosecution to be meticulous in observing the requirements of the said sections of the Act.

Lastly in regard to *Lau*'s case,[2] there was at p 251 the following comment:

> D Some effort to support it has been based on the suggestion that statements taken by the police may be 'edited' or influenced by the form of questions put to the witness by the officer taking the statement (*Proof of Guilt* (2nd Ed) by Glanville Williams at p 90 et seq). If the danger created some inherent objections to a witness's memory being refreshed from a statement made to the police, it would apply with no less force to statements used in court to refresh a witness's memory but, in *R v Mullins*, the Central Criminal Court and, in *Gleed v Stroud*, the E Divisional Court indicated quite clearly that they saw no such inherent objection to statements taken by the police.

The concern of this well-known author and jurist is not far-fetched. It echoes the concern of our legislature manifested in passing the three contiguous sections of the Act.

F Turning again to the facts of this case, the prosecuting officer in the course of Tan's testimony applied for an adjournment of the trial expressly to refresh Tan's memory. Defence counsel successfully objected. Then Tan claimed to be ill. Whether he was actually so or feigning, having heard what the prosecutor was saying and seizing on it to procure an adjournment, is not evident. The fact remains that the prosecuting officer applied again for G an adjournment, this time on the grounds that the witness was not well, this time successfully, and the trial was postponed until the next day. Upon resumption of the trial, Tan admitted in evidence that in the interim, his memory was indeed refreshed by reference to a written statement he had made to an officer of the ACA. Naturally counsel for the accused objected H to Tan's testimony claiming breach of the provisions of ss 159 and 161 of the Act. It is clear that the prosecution in taking the course that it did completely undermined the provisions last referred to. The course taken was wholly improper. The court had not seen and had no idea of the writing the witness was referred to. There was no way of ascertaining whether the conditions prescribed in s 159 were met. There was no material upon which I the court could exercise its discretion abovestated one way or the other. It was impossible to determine the true circumstances under which Tan's memory was refreshed and to boot, the right of the accused conferred under s 161 was denied. Furthermore, the prosecution in taking the course it did,

opened itself to grave suspicion of coaching the witness, inducement, threat or promise of favour. In this regard it had to be borne in mind that at the time Tan was in police custody. Also, according to Tan's own testimony, the episode constituted a 20 minute discussion.

As I see it, by reference to s 159(1), a witness must be construed to remain under examination notwithstanding interruption of the examination by momentary standing down of the witness or adjournment. To hold otherwise is to negate the statutory provisions applicable to refreshing memory. Admittedly, upon adjournment, it would be impossible to ensure that a witness does not breach the said provisions either of his own accord or at the instigation of others. The court however relies on all persons concerned in the administration of justice including witnesses to do the right thing. Also upon resumption of the trial, the witness will be open to examination as to whether or not during the adjournment, his memory was refreshed and upon the answer being in the affirmative, being further examined as to the circumstances thereof. Those in breach may well be guilty of contempt of court and offending against the provisions of the Penal Code (FMS Cap 45) relating to interference with the course of justice.

Bearing in mind that Tan held stage in the prosecution, being the complainant, and had given conflicting stories on a vital issue opening himself to impeachment under s 155 of the Act, the irregularities hereinbefore referred to and the overall circumstances of the case, the conviction cannot be upheld. It is not in the interest of justice that there should be a retrial. It would be futile, Tan being an irreversibly tainted witness. Accordingly, the appeal is allowed, the conviction set aside and the appellant is acquitted and discharged.

Appeal allowed.

Reported by Aslam Zainuddin